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CURRENT LAND LAW REFORM IN ENGLAND

IF the spirits of Coke and Fearne and Preston are wandering about the British Isles in these times, one can imagine that they are not altogether happy about the direction in which recent proposals for land law reform seem to be pointing. It would be baneful enough to the expounders of the "lean and wasteful learning" of our system of land law if these proposals formed part of a general program of land reform, undertaken by a Cobden crusading for free trade in land as in corn,[1] or by a socialist or labor party seeking to establish some end of social justice;[2] but to find them originating with experienced conveyancers and fathered by lord chancellors in such a way as to indicate complete freedom from influences outside the profession — then they are little short of scandalous, and the "authorities" have indeed reason to feel discomfited.

One hardly dares to imagine the reception which an American bar association might accord to a proposal that in the future all

[1] In his last speech at Rochdale, 23 November, 1864, Richard Cobden said: "If I were five and twenty or thirty . . . I would take Adam Smith in hand, and I would have a League for free trade in Land just as we have a League for free trade in Corn." 2 COBDEN, SPEECHES, p. 367. *Cf.* JOSEPH KAY, FREE TRADE IN LAND, 6 ed. (1881).

[2] The agitation for reform of the land law in England seems to have been at its height in the seventies, when the Land Tenure Reform Association and the Land and Labor League were active. HOBHOUSE, DEAD HAND, p. 163. But it seems to have subsided since, and it is in no way connected with the proposed changes in land law under discussion. Nor do these changes proceed in any way from the campaign of the nationalizers, like the Land Nationalisation Society and the Land Restoration League, described in SHAW LEFEVRE, AGRARIAN TENURES (1893), pp. 300, 305.

freeholds should be treated as leaseholds. And if such a proposal were coupled with a serious suggestion that the statute of uses should be repealed and many legal interests left to find protection in equity, it might be thought to smack of attacking the Constitution.[3] Yet these proposals form the backbone of a scheme for reforming English land law, which was carefully elaborated by experts under the ægis of a special government committee, to which Lord Birkenhead gave the stamp of government approval, and which was favorably considered by a joint committee of the two Houses of Parliament after it had passed a second reading in the House of Lords.[4] And when the Lord Chancellor adjourned the discussion of these features of the Law of Property Bill which is pending in the House of Lords, such professional leaders as Lord Haldane and Lord Buckmaster could not refrain from expressing their regret.[5]

America is not so remote from legislative currents in England that such a revolution might not leap across the Atlantic, and we may very properly seek to understand its meaning and its purpose. The original acceptance of English land law in America was not effected without important reservations.[6] We were saved from copyholds and manors, and in most states entails got little foothold.[7] Whether the English conception of tenure did or did not find

[3] *Cf.* Gillilan *v.* Gillilan, 278 Mo. 99, 112 (1919), where Chief Justice Bond, in speaking of the statutory substitute for estates tail, said that "the doctrine of primogeniture is radically opposed to the spirit, if not the letter of both" the federal constitution and the state laws, and "the idea that any such preference in the descent of real property could co-exist in the laws of any of the states, with the axioms of the Federal Constitution guaranteeing equal protection of the laws to all persons and a republican form of government for each state, or with the social and political life modeled on these fundamental principles, is an unthinkable absurdity." Yet Massachusetts still has primogeniture as to estates tail. Wight *v.* Thayer, 1 Gray (Mass.), 284 (1854).

[4] On 3 March, 1920. 39 PARLIAMENTARY DEBATES, 280. The report of the Joint Select Committee was printed as a White Paper (No. 106) on 30 June, 1920.

[5] On 26 July, 1920. 41 PARL. DEBATES, 490. Part I of the Bill, which includes the proposals for assimilation, was held over, but apparently not abandoned.

[6] *Cf.* the Massachusetts law of 1641, providing "That all our Lands and Heritages shall be free from all Fines and Licenses, upon Alienations, and from all Hariots, Wardships, Liveries, Primerseizins, year, day and waste, Escheats and forfeitures upon the Death of Parents or Ancestors, natural, unnatural, casual or judicial and that for ever." MASS. COLONIAL LAWS (1887 reprint), p. 88.

[7] Professor Jameson has attributed their unpopularity in the early years of the republic to the social revolution which accompanied the secession of the colonies. *Bos-*

its way into American law,[8] we have acted as if it had; the law of estates was swallowed whole, and if one would speak with conventional accuracy he must perhaps still say that while chattels are owned absolutely, land in many states can only be *held*. The fact that such language is out of keeping with current thought, even among lawyers and judges themselves, may mean that the profession has legislated tenure out of existence by neglecting it. Seisin is still a reality in modern law, though its foundations have long since become obsolete.[9] Under the sweeping rule that the English common law was accepted in America only to the extent of its applicability to American conditions, many innovations have been established. But there has been little systematic effort to appraise American conditions, or to measure the extent to which the English land law would serve them, and perhaps some of our law had already outlived its usefulness in England when we imported it to America.[10] Little of our law of real property antedates the Revo-

ton Transcript, 12 Nov., 1920. In the early part of the nineteenth century, there was a general feeling that entails were inconsistent with American democracy, as evidenced in the provision in the Missouri statute adopting the common law, that "the doctrine of entails shall never be allowed." Act of 19 January, 1816. 1 MO. TERR. LAWS, p. 436. The New York Revision Commissioners in their REPORT of 1828, p. 61, urged that "it should never be forgotten, that it is the partibility, the frequent division, and unchecked alienation of property, that are essential to the health and vigor of our republican institutions."

[8] GRAY, PERPETUITIES, 3 ed., § 23; Hudson, "Land Tenure in Missouri," 8 LAW SERIES, MISSOURI BULLETIN, 4. Tenure in New York was made "allodial and not feudal" by the Act of 20 February, 1787. On tenure in other British settlements, see Atty. Gen. *v.* Brown, 2 S. C. (New South Wales) 30, 35. 39 (1847); Veale *v.* Brown, 1 John. N. Z. C. A. 152, 157 (1868); *In re* Stone's Estate, 1 WESTERN WEEKLY, 563 (Saskatchewan) (1920). The 1920 Bill does not propose to abolish tenure in England altogether; copyhold tenure would disappear under it, but the assimilation of freeholds to leaseholds would not affect the conception that all land in England is *held* and not *owned*.

[9] "The old Anglo Saxon theory, or rather fact, of seizin . . . is none the less a living part of the real estate law of to-day because in the daily practice of conveyancers it has become so obscured by the intricacies and ramifications of our record titles, that as Sir Frederick Pollock says, 'It is possible for even learned persons to treat it as obsolete.'" Davis, J., in MASSACHUSETTS LAND COURT DECISIONS, p. 7 (1899). *Cf.* Early *v.* Early, 134 N. C. 258, 265, 46 S. E. 503 (1904); WILLIAMS, SEISIN OF THE FREEHOLD, (1878).

[10] Our failure to modernize some of the rules borrowed from England did not escape attention in England. Thus Lord St. Leonards, then Edward Sugden, writing to James Humphreys in 1826, said (p. 76): "It is a singular circumstance, that whilst we complain of our law of property, and are so anxious for new laws, the infant state of America is daily adopting ours, with scarcely any variation, and particularly those

lution. In most jurisdictions it has grown up since the beginning of the nineteenth century, and as we excluded the recent English statutes in adopting the common law we have lost the benefit of many statutory improvements then already made in England. As the legislation of the reform period in England began to free the English law of its anachronisms, we were taking over the common law in unadulterated form. It is not strange that some of its historical rules still survive with us after they have been all but forgotten in England.[11] The result in America has been tolerable only because the needs of a new and busy land market have given us informalities in conveyancing, and the settlement of the West our system of land registry.

Nor has the advantage of our fresh start been capitalized for legislative improvement in our land law after its adoption. The outstanding if not the only thoroughgoing attempt made in America to overhaul the imported law of real property is that of the New York Revision Commissioners in 1828.[12] Their report shows that they had carefully studied the latest currents in land law reform in England.[13] If one may regret that their work was not revised a decade later, after the reports of the English Real Property Commissioners and the dozen or more English statutes based upon their recommendations, he must nevertheless be grateful for the intelligence with which they sought to render the New York law "more plain and easy to be understood." When the New

portions of the operation of which we appear to complain most loudly." SUGDEN, LETTERS TO JAMES HUMPHREYS, p. 76 (1827).

[11] For instance, although the ENGLISH REAL PROPERTY ACT of 1845 made impossible the failure of a contingent remainder because of the termination of the particular estate by forfeiture, surrender, or merger, this pitfall must still be guarded against in Illinois and some other American jurisdictions. Gray *v.* Shinn, 293 Ill. 573, 127 N. E. 755 (1920); Randolph *v.* Wilkinson, 128 N. E. (Ill.) 525 (1920). See KALES, ESTATES, § 106.

[12] The second part of the report of the Commissioners appointed in 1825, dealing with "the acquisition, the enjoyment, and the transmission of real and personal property, and concerning the domestic relations," was issued in several instalments in 1827 and 1828. See also the REPORT OF THE COMMISSIONERS OF STATUTORY REVISION OF 1896, p. 481; and the REPORT OF THE BOARD OF STATUTORY CONSOLIDATION in 1907, p. 4896.

[13] It contains numerous references to HUMPHREYS, OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY, WITH OUTLINES FOR A SYSTEMATIC REFORM (1826); to SUGDEN, LETTERS TO JAMES HUMPHREYS (1827); and to Lord Brougham's famous speech on THE PRESENT STATE OF THE LAW, delivered in the House of Commons, 7 February, 1828.

York statutes of 1830 were imitated in Michigan, Minnesota, and Wisconsin, and to some extent in California and the Dakotas, they underwent few changes, and they have since escaped significant revision.[14] In other American jurisdictions, even in the legislation incident to setting up the new jurisdictions in Western states, there have been few attempts to modernize the heritage which Blackstone's executorship assured to us. If now and then a significant change is made, as in the 1916 Massachusetts Contingent Remainders Act, it is more likely to be the result of a professional sensation than the product of a scientific study of the serviceability of our land law to the needs of modern communities. In a field conspicuous for its aloofness from the play of moral conceptions, where legal rules are quite unaffected by changing social theory and political organization, we have shown little disposition in America for scientific evaluation; and but for the work of a few law school men like Gray and Kales and Rood, our jurisprudence would have been almost stagnant. The judges have not rebelled, only because their doctrines of intention and their rules of interpretation have furnished the necessary escape when courts have been embarrassed by outcroppings of the ancient feudal law; but the advocate cannot always be sure that the escape will be found, nor how it will be found, and the public takes the risks of this "uncognoscibility" in expensive litigation.[15]

It has not been so in England, partly because more numerous survivals have made the situation more acute, and perhaps partly because habituation to investigation by royal commissions has played such a large rôle in legislation and government. Though Lord St. Leonards had found it possible to say in 1826 that the general rules of the law of property were "as perfect as human intelligence could make them," [16] it was impossible for the law of

[14] In the 1919 WISCONSIN STAT., for example, the whole of chapter 95 on Real Property, and the Nature and Qualities of Estates Therein, seems to date from 1849, with the single addition of the § 2070 *a*.

[15] For example, Biwer *v.* Martin, 128 N. E. (Ill.) 518 (1920), in which the Supreme Court of Illinois holds that a covenant of warranty in a deed creating a contingent remainder precluded its destruction by merger of the particular estate and the reversion. See also State *ex rel.* Farley *v.* Welsh, 175 Mo. App. 303, 162 S. W. 637 (1913), where the escape was found by giving to the same limitation very different results as to the realty and the personalty. But in Frame *v.* Humphreys, 164 Mo. 336, 64 S. W. 116 (1901), the escape was not found.

[16] In his letter of 25 October, 1826, to James Humphreys, 3 ed. (1827).

real property to escape the spirit of the reform period of 1832. The Prescription Act of that year, and the Real Property Limitation Act, the Dower Act, the Fines and Recoveries Act, the Inheritance Act, and the Administration of Estates Act of 1833, and the Wills Act of 1837 engrafted a substantial body of modern notions upon the feudal system without seriously disturbing it. At no period since has the law of real property been permitted to fall out of the sight of English legislators. The Real Property Act of 1845 and the Amending Acts of 1859 and 1860 brought important modifications, of some of which we are still in need in some jurisdictions in America. The Registration of Title Act in 1862 and the Land Transfer Acts of 1875 and 1897 have sought with questionable success the still debated advantages of land registration, making it compulsory in London and optional throughout England; in conferring the legal estate on the personal representative, the Land Transfer Act of 1897 has all but made over the law concerning devolution of real property.[17] The Contingent Remainders Act of 1877, the result of a professional sensation,[18] took another short step away from the feudal law of contingent remainders by relieving them altogether of dependence on particular estates. The Conveyancing Act of 1881, amended in 1882 and 1911, is an important milestone in the history of "code-word" conveyancing. The Settled Land Acts of 1882, 1884, and 1890, based upon one of the most useful legal inventions of modern times, by which a life tenant of an entailed or settled estate can convey so as to bind his successors, have made notable progress toward facilitating the transfer of land in which estates are held by numerous persons. Other legislation of great importance in a general consideration of the social and economic utility of land law,[19] such as the Corn Pro-

[17] As instanced in *Re* Robson, [1916] 1 Ch. 116, where a contingent remainder was saved on the ground of its being equitable by reason of this provision in the LAND TRANSFER ACT. But *cf.* Barrett *v.* Barrett, 18 State Rep. (N. S. W.), 637 (1918).

[18] In Cunliffe *v.* Brancker, 3 Ch. Div. 393 (1876).

[19] Some statutes which do not directly relate to land law have had a very wide influence also; among these should be mentioned the SOLICITORS' REMUNERATION ACT of 1881, abolishing the 72-words-for-a-shilling rule for compensating solicitors, and putting their remuneration on a commission basis. On the evils of the old rule, see comment by JOSHUA WILLIAMS, 2 JUR. SOC. PAPERS, p. 597 (1858–63).

The present study does not cover such legislation as the proposed amendments to the Corn Production Act of 1917, one of which would empower the Minister of Agriculture and Fisheries to appoint a receiver to take charge of any agricultural land

duction Act of 1917, may be left out of account in dealing only with the changes in real property law itself. Some indication of English legislative activity is to be had from a list of statutes dealing with land law, ascribing fourteen statutes to the eighteenth and one hundred and thirty-eight to the nineteenth century.[20]

During this period the profession in England has also had the advantage of numerous extensive and more or less scientific inquiries into the operation of real property law. The Real Property Commission of 1828, the Royal Commission of 1854 on Registration of Title, the Royal Commission of 1868 appointed to inquire into the operations of the Land Transfer Act of 1862, the Select Committee of 1878 on Land Titles and Transfer (known as Mr. Osborne Morgan's Committee), and the Royal Commission of 1908 on the Land Transfer Acts, have laid a scientific foundation for reconstructing the English system of land law.[21] Indeed, in few fields of law has there been afforded such opportunity for intelligent appraisal of its service.

But in spite of the volume of legislation, discontent with the existing situation still prevails in many quarters, especially among professional experts and conveyancers.[22] The 1911 report of the

which in the opinion of an agricultural committee was being cultivated or managed "in such a manner as to prejudice materially the production of food thereon." See 134 PARL. DEBATES 1601 (1920); 65 SOL. JOUR. 54.

[20] In JENKS, MODERN LAND LAW (1899), p. xiv.

[21] The Commission of 1828 made four reports: in 1829 (10 PARL. PAPERS), in 1830 (11 PARL. PAPERS), in 1831–2 (23 PARL. PAPERS), in 1833 (22 PARL. PAPERS). The 1854 Commission made its report in 1857; the 1868 Commission in 1870, and attempts were made to give effect to its recommendations in bills introduced in Parliament in 1870, 1873, and 1874; the Select Committee of 1878 made a report in July, 1878, and after being reappointed, a second report in June, 1879; the 1908 Commission published its final report in 1911 (Cd. 5483). The minutes of evidence taken before these commissions are invaluable. On the work of the 1908 Commission see FORTESCUE BRICKDALE, METHODS OF LAND TRANSFER (1914), p. 175 *et seq.*

The three reports of the Chancery Commission of 1850 should also be mentioned in this connection, especially the second report on "the state of the law in relation to matters testamentary" published in 1854.

[22] "The English law of real property is a disgrace to a country which aspires to be numbered amongst civilized nations." Mr. T. Cyprian Williams, in 2 MINUTES OF EVIDENCE BEFORE LAND TRANSFER COMMISSION OF 1908, p. 362. "Our law of real property is in fact a hopeless jumble of inconsistent doctrines, causing the student a great waste of time in his attempts to master it, and providing innumerable pitfalls for the unskilled practitioner." Mr. Charles Sweet, in 24 L. QUART. REV. 26, 34 (1909). "English Land Law, full of interest for the historian, is full of traps for the practitioner, who must always be on the watch to see that some archaic rule does not spring up at

Royal Commission on the Land Transfer Acts teems with expressions of dissatisfaction, some of which are so extreme that one would be inclined to disregard them if they were not spoken by such experienced leaders of the profession. If the reform forces have in the past contented themselves with modifications of an existing system, they have in recent years become bolder in proposing reforms so radical that little would remain of the common law system of real property — they even speak of "abolishing the law of real property." [23]

Nor is this discontent frittered away in words. Attempts at drastic legislative change are so persistent that some fruition would seem inevitable if the activity continues, whatever the fate of the present Bill. In 1897, Lord Davey introduced into the House of Lords the so-called "Wolstenholme Bill," [24] which would have had the effect of abolishing all estates except fees simple and estates for years, and of leaving all other interests to take effect in equity. In 1907, the decision in *Copestake* v. *Hoper*,[25] with its startling reminder of the lingering feudal law of heriot, served effective munition to discontent. In 1908 a Royal Commission on the Land Transfer Acts was appointed, and its report in 1911 is a mine of comment and suggestion. In 1913, Lord Chancellor Haldane introduced a Real Property Bill and a Conveyancing Bill,[26] the latter of which

an inopportune moment, to wreck his careful and prosaic plans." Mr. EDWARD JENKS, DIGEST OF ENGLISH CIVIL LAW (1911), Bk III, p. xix. "That the present law of real property is cumbrous, archaic and expensive no one acquainted with it can deny." Mr. ARTHUR UNDERHILL, THE LINE OF LEAST RESISTANCE (1919), p. 1. "The existing law of real property is archaic and unnecessarily complicated." ACQUISITION AND VALUATION OF LAND COMMITTEE, 4TH REPORT (1919), p. 10. "I am certain that posterity will say, 'How was it that a nation so practical as the British nation for so long tolerated so many inconvenient and costly anachronisms?'" Lord Chancellor Birkenhead in the House of Lords, 3 March, 1920, 39 PARL. DEBATES, 264.

[23] 31 L. QUART. REV. 353.

[24] Mr. E. P. Wolstenholme, author of a treatise on the CONVEYANCING ACTS, was a member of the Land Transfer Commission of 1868, and was spoken of (in 21 L. QUART. REV. 24) as "perhaps the greatest living authority on the practice of conveyancing." He was responsible for the underlying ideas of the CONVEYANCING ACT of 1881, and of the SETTLED LAND ACT of 1882 which has been characterized as the "greatest real property act of the century" by Mr. ARTHUR UNDERHILL, in A CENTURY OF LAW REFORM, p. 291. The scheme embodied in the bill of 1897 and with which his name has been associated, was first put forward by him in a paper read before the Juridical Society in 1862. 2 JURID. SOC. PAPERS, 1858–1863, p. 533. It was also described by him before the 1878 Select Committee, REPORT of 1878, p. 210.

[25] [1907] 1 Ch. 366, [1908] 2 Ch. 10.

[26] Commented on by Mr. Arthur Underhill in 30 L. QUART. REV. 35.

adopted the Wolstenholme scheme to some extent, and the two were later combined in a Real Property and Conveyancing Bill, which was again introduced in 1914.

In January, 1919, the Ministry of Reconstruction requested the Acquisition and Valuation of Land Committee "to consider the present position of land transfer in England and Wales and to advise what action should be taken to facilitate and cheapen the transfer of land." [27] During its inquiry, this committee "became convinced that the main defects in the existing system of conveyancing do not lie either in the Conveyancing Acts or in the practice of conveyancing, but in the general law of real property." The members of the committee agreed unanimously "that the existing law of real property is archaic and unnecessarily complicated, and that no great improvement in the existing systems of transfer of land, whether registered or unregistered, can be effected until the law of real property has been radically simplified." This conclusion led the committee to recommend the enactment of amendments in the law of real property and conveyancing, as "absolutely necessary to cheapen and facilitate the transfer of land." The proposed amendments are embodied in the so-called Cherry Bill, recently introduced in the House of Lords by Lord Chancellor Birkenhead.[28]

The Bill is exceedingly bulky and it covers a wide range of topics.[29] "Its great length is due, not to provisions for abolishing the exist-

[27] This committee was originally appointed by the Prime Minister in 1917. Its first report in January, 1918 (Cd. 8998), and its second report in November, 1918 (Cd. 9229), dealt with the acquisition of land for public purposes; its third report in March, 1919 (Cd. 156), dealt with the acquisition of mines; and its fourth report in November, 1919 (Cd. 424), with land transfer.

[28] Mr. B. L. Cherry, one of the leading conveyancing counsel in London, had a prominent part in framing the bill, and it is therefore known by his name. He was also one of the draftsmen of Lord Haldane's Bill in 1914.

Numerous comments on the unamended bill have been published, of which the more important are those by Mr. Arthur Underhill, in 36 L. QUART. REV. 107; by Mr. Charles P. Sanger, in 20 COL. L. REV. 652; and the editorial articles in 64 SOL. JOUR., 373, 388, 407, 460. See also the comparative study of "Property Law Reform at Home and Overseas," by Mr. Hogg, in 64 SOLICITORS' JOUR., 385, 405, 421, 442, 458. The report of the Conveyancers' Institute's Committee has also been published in 64 SOLICITORS' JOUR., 741 (28 August, 1920). The Amendments in the Bill made by the Joint Committee are discussed in 150 L. T. 67, 89.

[29] The amended bill contains 185 clauses, in addition to the sixteen schedules — 276 pages altogether.

ing law, but to provisions introduced in order to stop gaps in it." Much of it is devoted to amendments which would be necessitated in the Settled Land Acts, the Conveyancing Acts, and the Trustee Acts, by the changed bases of the law of real property. The elaborate provisions for changes in the system of land registration are of great local interest, but less important to an American observer because of our very different systems. The most interesting if not the most far-reaching proposals are those for assimilating freeholds to leaseholds, for repealing the statute of uses, and for placing "all interests in land, except legal estates in fee simple and for a term of years absolute, behind a curtain consisting of either a trust for sale or a settlement." But other features of the Bill will also merit careful consideration.

It is easy to envisage the proposed abolition of copyhold tenure, but on first impression the suggestion that two radically different branches of law may be assimilated smacks of the impossible, even in an age of miracles worked by legislative fiat. It is not a new idea, however. Two generations have elapsed since Joshua Williams proposed the abolition of the greatest difference between real and personal property by having estates pass like chattels to the personal representative on the death of the owner.[30] This step toward assimilation was actually taken in the Land Transfer Act of 1897.[31] The proposal of complete assimilation was discussed before the Select Committee of 1878,[32] and it was considered at some length and approved by the Land Transfer Commission of 1908, which found that it would be a "material aid to a satisfactory system of land registry." [33] It had formed a part of Mr. Wolstenholme's Bill of 1896, which was designed "to make the title to land approximate as nearly as circumstances permit to the title to stock," and also of Lord Haldane's Bill of 1914. The recent commission,

[30] In a paper before the Juridical Society in 1862. 2 JUR. SOC. PAPERS, 1858–1863, pp. 589, 615.

[31] 60 & 61 VICT. c. 65. Part I of the ACT of 1897 "has a curious history. The draft was originally prepared, I believe, by the late Lord Selbourne, with a view to assimilating the devolution of the *beneficial* interests in land to that of personal estate." B. L. Cherry, in 2 MINUTES OF EVIDENCE BEFORE LAND TRANSFER COMMISSION OF 1908, p. 209.

[32] See REPORT OF July, 1878, p. 82, where the suggestion is attributed to Mr. Senior.

[33] See REPORT OF 1911, p. 53. See also the preface to SANGER, WILLS AND INTESTACIES (1914).

reporting in 1918, gave it unqualified endorsement,[34] and it is the basic part of the attempt to reform the law of real property in the 1920 Bill.

The essential differences between movables and immovables have found recognition in all systems of law, and if our categories of real and personal property were based solely on such differences, assimilation would doubtless be unthinkable. But it is an anomaly which a person schooled in another system of law must find difficult of comprehension, that in our law a fee simple is treated as real property, whereas a term for ten thousand years in the same land would be treated as personal property and be dealt with in a very different way. In America, one may explain that terms of such length do not in fact occur. In England, however, the difference has not lost its practical importance, in spite of the provision in the Conveyancing Act of 1881 making terms of two hundred or more years easily convertible into freeholds.[35] But anomalies have often found themselves agreeable bedfellows in the common law, and a busy profession demands other reasons before it is impressed with the necessity for reforms. The protagonists of assimilation in England urge the general unsatisfactoriness of real property law, its many survivals of rules which have outgrown their usefulness, the difficulty in mastering its details, and the expense and inconvenience attending conveyances, as against the simplicity and satisfactoriness of the law of chattels real. One must be convinced of the necessity for a general reform before he will see any necessity for considering the proposal to assimilate. The question will then remain whether assimilation is the best remedy for the ills to be escaped. It is due to the frequent comparison of land and shares by the advocates of similar registry systems for both that this avenue seems so close at hand. And we have a precedent in the resort to the law of leaseholds for the action of ejectment.

The method of assimilation proposed in the 1920 bill has a simple appearance. The Bill would enact that

[34] FOURTH REPORT, 1919, p. 11.

[35] While a limit was at one time set on the number of years for which a term could be created — in COKE, LITTLETON, 45*b*, forty years is said to have been the ancient limit, but it must have been abandoned at an early date, — it has now long been clear that no limit exists. An American jurisdiction might have some difficulty in dealing constitutionally with long terms as they are dealt with in the Conveyancing Act of 1881. In a few states, there is a statutory limit on the length of terms. See MINN. GENERAL STATS. 1913, p. 2074; ALABAMA CODE OF 1907, § 3418.

"every estate in fee simple in freehold land . . . whether in possession, reversion or remainder, shall, subject to and in accordance with the provisions of this Act, for all purposes, whether of disposition, settlement on persons in succession or otherwise, transmission, devolution . . . distribution and administration on death, have all the incidents of a chattel real estate held for a term of years certain, save that such estates shall continue in perpetuity and may be called freehold estates in fee simple."

Such a reform would have the obvious advantage of blazing no new and untried paths; it would not create a new body of law, but would provide a new application of existing law. As a simplifying expedient, it might prove effective; the mysteries of seisin would vanish at once, and conveyances would lose much of their ominousness. Mr. Underhill thinks it would "do away with all the complexities and anomalies of the existing law of freeholds . . .; would abolish tenure and seisin and other dry bones of feudalism; would render obsolete the existing equitable rules as to conversion as between heirs and next of kin; would simplify the administration of assets on death; and would, at all events, unify the law of land." [36] But as an escape from the feudal bases of the law of real property, one may doubt whether this method would be altogether successful. Like the historic failure of the statute of uses, it might serve to perpetuate what it is designed to extirp and extinguish; for the law of chattels real cannot be thoroughly understood apart from the law of freeholds with which it has grown, and to handle the one, it may still continue necessary to master the other, so that the necessity of the student's knowing the old "calculus of estates" would still remain.[37] The transition involved would not be free from difficulties — for instance, the existing uncertainties in the law of future interests in chattels real, as explained by Professor Gray,[38] would be enhanced in importance.

[36] In THE LINE OF LEAST RESISTANCE, p. 29.

[37] The Report of the Conveyancers' Institute therefore expresses the fear that the bill would have the "fault, which has characterized all real property legislation since that of 1833, viz., that it adds to the now well-nigh intolerable burden of what a student of English law must learn, and takes but little away." 64 SOLICITORS' JOUR. 741 (28 August, 1920).

[38] In an article entitled "Future Interests in Personal Property," 14 HARV. L. REV. 397. See also Hudson, "Executory Limitations of Property in Missouri," 11 LAW SERIES, MISSOURI BULL., p. 29. It is interesting to note that Professor Gray concluded his study by asking (p. 420), "Would it be too bold a step on the part of the

If the law of freeholds were assimilated to the law of leaseholds, it would obviously be necessary either to repeal the statute of uses or to extend its application to personalty. The proposals for reforming the law of real property in the early part of the last century were designed to extend rather than to limit the application of the statute of uses, and to escape the narrow construction which the courts had placed upon it.[39] It was the conclusion of the Real Property Commissioners of 1828 that while a "system of infinite subtlety" had been built upon the statute, yet "most of the evils which it was meant to remedy remain." [40] In 1862, Mr. Joshua Williams in a paper before the Juridical Society urged the repeal of the statute of uses.[41] He thought it would have the effect of abolishing much useless learning which since the restoration of trusts of freehold estates only "cumbers the ground and not infrequently entangles the practitioner." The Select Committee of 1879 recommended that the statute should be repealed, on the ground that it provides "for a state of things which has long since passed away." [42] If one could accept the dictum attributed to Lord Chancellor Hardwicke that its only effect has been to add three words to a conveyance,[43] the repeal of the statute would not need to be viewed very seriously.

courts to drop this bit of antiquated scholasticism [as to future interests] and put chattels real in the same position as chattels personal?" Mr. Arthur Underhill seems to think this step has been taken — "the law only recognizes an absolute owner of a term of years, just as it only recognizes an absolute owner of stocks or shares." THE LINE OF LEAST RESISTANCE, p. 22.

[39] HUMPHREYS, OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY (1827), p. 273; and BROUGHAM, PRESENT STATE OF THE LAW (1828), p. 57. It was due to these proposals that the New York Revision Commissioners framed the New York legislation which they foresaw might be "viewed by some as an alarming innovation," but as to the adoption of which they felt "a serious anxiety." REPORT of 1828, p. 41. Hence the New York statute effects a much more extensive execution of the use than was accomplished by the English statute.

[40] FIRST REPORT OF REAL PROPERTY COMMISSIONERS (1829), p. 8.

[41] 2 JUR. SOC. PAPERS (1858–63), 589, 623.

[42] "Among the various pitfalls for the unwary presented by statutes, providing for a state of things which has long since passed away, few have led to more expense or litigation than that stronghold of conveyancing pedantry, the statute of uses. Your Committee see no reason why it should not at once be repealed." 1879 REPORT OF SELECT COMMITTEE, p. ix. See also p. xiv, and the 1911 REPORT OF THE LAND TRANSFER COMMISSION, p. 380.

[43] In Hopkins *v.* Hopkins, 1 Atkyns, 580, 591 (1738). The authenticity of this remark was questioned in the early part of the nineteenth century, "as not to be found in a ms. note of Hopkins *v.* Hopkins." BROUGHAM, STATE OF THE LAW (1828), p. 57,

The statute of uses served very useful purposes in an era of legislative inactivity. Its aid in liberalizing the law as to future estates and in simplifying the methods of conveyancing is not to be minimized. The New York Revision Commissioners concluded that its advantages could be kept without retaining uses as they were perpetuated by construction of the statute, while the recent commission in England thought they could be kept without retaining the statute. Few purposes seem to be served by the statute to-day. Its application can be thwarted very simply by creating a use on a use, or by an active trust. In *inter vivos* conveyances, the operation of the statute is perhaps unnecessary even in those jurisdictions where statutory grant is unknown, for bargain and sale may now have achieved the position of a common law conveyance, even where the statute of uses is said not to be in force.[44] In devises, the intention of a testator may be effectuated without employing the statute, though it seems difficult to accept the statement that the statute "does not of its own force apply to wills." [45] If powers of appointment still depend on the statute for their efficacy, independent support would need to be given them, as the English bill provides. The statute may serve some convenience in avoiding the necessity of a conveyance by a trustee whose duties have been performed,[46] but this necessity would be obviated quite

note. It was pointed out by Dean Ames in 21 HARV. L. REV. 274, that "Lord Hardwicke himself . . . put the matter much more justly" in Buckinghamshire *v.* Drury, 2 Eden, 60, 65 (1761).

[44] Thus a conveyance by deed which would have been good as a covenant to stand seised has been upheld where the statute of uses was not in force. Thompson *v.* Thompson, 17 Ohio St. 649 (1867). "Several courts have declared — with a simplicity that might startle the wise man filled with legal learning, but most acceptable to every one not sufficiently learned to have lost his common sense — that the forms of conveyance in common and inveterate use ought to be, and will be, sustained, without much regard to the requirements of the ancient common law, or whether any statute has altered or abrogated such requirements." Professor Rood, "The Statute of Uses and the Modern Deed," 4 MICH. L. REV. 109, 114.

[45] *Cf. Re* Brooke, [1894] 1 Ch. 43, 48.

[46] *Cf.* Glover *v.* Condell, 163 Ill. 566, 45 N. E. 173 (1896), and Reichert *v.* Missouri, etc. Coal Co., 231 Ill. 238, 83 N. E. 166 (1907).

The statute of uses was repealed in New Zealand in 1905; and it is said not to be in force in several American jurisdictions. See Rood, "The Statute of Uses and the Modern Deed," 4 MICH. L. REV. 109, 122 (1905). The 1919 CONVEYANCING ACT in New South Wales provides that (Section 44) "Every limitation which may be made by way of use operating under the statute of uses" may be made by direct conveyance.

The 1905 NEW ZEALAND STAT., p. 257, provides that the whole legal and equitable

easily by a statutory provision that when the purpose of a trust ceases the trustee's estate or title ends.[47] In short, so little inconvenience would result from repealing the statute that this seems to offer no insuperable difficulty to assimilation. But it is in connection with another proposal in the English bill that it has its chief advantage — the proposal for limiting the creation of legal interests and for enabling purchasers to take free of all equitable interests even though they have notice.

The variety of estates and interests which may be created in land has long made conveyancing a difficult matter, less so in America than in England because of our registry system. The mere assimilation of freeholds to leaseholds would not greatly simplify nor shorten conveyances. So the proposed reform would extend a principle already adopted in the Settled Land Acts and restrict the number of legal estates which may be created and with which a purchaser must concern himself, leaving all other interests to take effect in equity and relieving purchasers of the burden of notice of them. It was the general purpose of the Settled Land Act of 1882

"to give to an owner for the time being, having a beneficial interest in land under a settlement, whether the subject of settlement be an estate in fee simple or a less estate, power to dispose of or deal with the land or the estate or interest therein which is settled, so as to turn it to the best account, in the same manner as if he were a prudent owner absolutely entitled to the subject-matter of the settlement, and having complete power of disposition; care being at the same time taken to preserve the *corpus* of the property for the benefit of the successors in title of the owner for the time being." [48]

Mr. Wolstenholme had long urged the extension of this principle to concurrent as well as to all successive interests, and the framers of the Cherry Bill attempt to accomplish this by providing that

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title shall vest on a transfer, but may be so conveyed in trust; and that limitations previously made by way of shifting and springing uses may be made directly. This form is unfortunate, for it perpetuates the old learning apart from which the statute cannot be applied.

[47] As in § 109 of the N. Y. Real Property Law. CONSOL. LAWS 1909, c. 52.

[48] WOLSTENHOLME AND TURNER, SETTLED LAND ACT, 1882, p. 1. James Humphreys' proposals in 1827 looked in the same direction. HUMPHREYS, REAL PROPERTY, p. 292.

legal interests shall be confined to fees simple, terms for years, rent charges, and easements,[49] and by converting all other legal estates or interests into equitable interests, providing also that legal estates cannot be created in an undivided share in land. This would leave executory limitations and devises, for instance, to take effect in equity, and all equitable estates and interests would be "kept off the title," but would be protected as to the proceeds of any sale by provisions not unlike those adopted in the Settled Land Acts, requiring that the proceeds as capital money be paid to trustees. The bill was described in the Lord Chancellor's memorandum as placing "all interests in land, except legal estates in fee simple or for a term of years absolute, behind a curtain consisting of either a trust for sale or a settlement," and as freeing "a purchaser in good faith from any obligation to look behind the curtain." So radical a step could hardly be taken where the innovation had not already been made in the Settled Land Act provisions for effectuating a life tenant's conveyance of the fee of settled land. It extends the principle by which a trustee with power of sale can pass a title to a purchaser who knows of the cestui's interest and the latter's ownership is shifted to the proceeds. These two familiar ideas soften the proposal to an English lawyer, though it has been the subject of a vehement protest in the House of Lords.[50]

The provisions of the bill for abolishing the law of estates are carefully elaborated. Since legal life estates and legal estates tail do not exist in chattels real, assimilation would abolish them altogether. The life estate is enlarged to a fee simple, in line with the policy of the Settled Land Acts making life tenants in a sense trustees for their successors; and the proposed amendments to the Settled Land Acts proceed on the principle that "subject to proper safeguards being provided for the remainderman, the tenant for life or other statutory owner of full age should be placed on approximately the same footing as an absolute owner." On the death of a life tenant, the land passes to his representative in trust for the successors. Estates tail are left entirely to equity, so far as the interests after the first taker's are concerned, with provision for barring the entail by will; and instead of abolishing entailed interests, as might formerly have been anticipated, they are to be

[49] Section 2 of the proposed Bill spells these out in greater detail.

[50] By Lord Cave. But see Mr. Underhill's reply in 36 L. QUART. REV. 113.

extended to chattels personal.[51] The mortgagee's interest is made a term for three thousand years "subject to a provision for cesser corresponding to the right of redemption." Less important provisions are included for abolishing *interesse termini;* for requiring a term to take effect not more than twenty-one years after its creation; and for converting perpetually renewable leaseholds into long terms.

It is gratifying to see the proposal to sweep away the rule of *Whitby* v. *Mitchell*,[52] often referred to as the rule against double possibilities, and this part of the bill may be regarded as a triumph for Mr. Gray, who insisted that *Whitby* v. *Mitchell* only revived an "*alleged* relic of antiquity." [53] It seems difficult to agree with the objection to abolishing the rule as stated in the report of the Conveyancers' Institute Committee, that it would "enable land to be tied up for at least a generation further than is now possible." [54] There is stronger reason now for judicial rejection of the rule in America, in view of this indication of the doubtful English attitude toward it. It is interesting to find an eminent commentator on the Bill, regretting that it does not include amendments to the "ordinary rule against perpetuities which often causes great injustice, and is a trap for the unwary." [55] Such amendments had formed a part of Lord Haldane's Bill in 1914. We are in need of such legislation

[51] "We thought it right that it should be open to the weaver who lives in a cottage to say that his furniture shall go to his son's son after him." Lord Haldane, in the House of Lords, 26 July, 1920, 41 PARL. DEBATES, 494. But the course of opinion in recent years had seemed to call for the abolition of entails. Bills to this end were introduced in 1877, 1878, and 1882, and in DE VILLIERS, HISTORY OF REAL AND PERSONAL PROPERTY (1901), p. 65, it is confidently asserted that "the proposal which promises to be first adopted by law is that of abolishing estates tail either altogether or as soon as the tenant in tail comes of age." The convenience of entails in dealing with heirlooms and family treasures is obvious.

It is interesting to note that the 1919 CONVEYANCING ACT in New South Wales follows the statutes of several American states giving a life estate to the first taker, "with a remainder to his heirs or the heirs of his body as purchasers."

[52] 44 Ch. D. 85 (1890). But if assimilation were effected, it might be thought unnecessary to deal with Whitby *v.* Mitchell in view of the decision in *In re* Bowles, [1902] 2 Ch. 650, refusing to apply it to personalty.

[53] In 29 L. QUART. REV. 31.

[54] 64 SOLICITORS' JOUR. 741.

[55] Mr. Arthur Underhill, in 36 L. QUART. REV. 114. See also the suggestion of Mr. W. Whitworth for amending the rule against perpetuities, in 64 SOLICITOR'S JOUR. (12 June, 1920) 567; the reform he proposes would validate a future interest if the event postponing its vesting actually happens within the period allowed. It has already been enacted in Victoria and New South Wales. 64 SOLICITOR'S JOUR. 581.

in America, and if a recent decision in Massachusetts is to be followed,[56] the situation will be very inconvenient without it.

Assimilation also carries in its train the necessity for important changes in the law of conveyancing and descent. It is proposed that in a conveyance a fee simple shall pass without words of limitation, unless a contrary intent appears;[57] and similar effect is assigned to conveyances to corporations sole; and the bill would allow a person "to convey or vest or purport to convey or vest land to or in himself." The period of title would be reduced from forty to thirty years. Numerous amendments to the Conveyancing Acts and Settled Land Acts are of more local interest. The élaborate provisions by which undivided shares shall in future take effect behind a trust for sale are designed to put an end to the evils of common ownership which Mr. Underhill describes in such lurid terms.[58] The creation of machinery for easily securing the discharge or modification of restrictive covenants affecting freehold land might raise very troublesome constitutional questions if it were attempted in America.[59]

But it is in the law of descent that the most far-reaching consequences of assimilation may be anticipated, for it is here that the most glaring anomalies resulting from our differences between real property and chattels real are to be found. In cases of intestacy, the Bill would abolish altogether descent to the heir. It would pass all real and personal property to the personal representative in trust for sale, and extensive powers would be conferred on the representative, continuing during any minority or the subsistence

[56] Eastman Marble Co. *v.* Vermont Marble Co., 128 N. E. (Mass.) 177 (1920), denying a recovery of damages for violation of a contract to convey land within twenty-five years.

[57] Since 1837, the ENGLISH WILLS ACT has provided that a fee simple may pass by devise without words of limitation. The CONVEYANCING ACT of 1881 enacted that a conveyance to A "in fee simple" should be sufficient without the word "heirs." This has preserved the necessity for words of limitation, for in *Re* Ethel, etc., [1901] 1 Ch. 945, it was held that A took only a life estate by a conveyance to him "in fee." And it has been a mooted point whether "in simple fee" will have the effect of "in fee simple." See Mr. T. Cyprian Williams in 2 MINUTES OF EVIDENCE BEFORE LAND TRANSFER COMMISSION OF 1908, p. 374.

[58] In 36 L. QUART. REV. 116.

[59] *Cf.* Riverbank Improvement Co. *v.* Chadwick, 228 Mass. 243, 117 N. E. 244 (1917), discussed in 31 HARV. L. REV. 876; and Bull *v.* Burton, 227 N. Y. 101, 124 N. E. 111 (1919), discussed in 33 HARV. L. REV. 820.

The 1918 REAL PROPERTY ACT in Victoria (No. 2962) and the 1919 CONVEYANCING ACT in New South Wales (No. 6) also deal with the release of restrictive covenants.

of any life interest. It would abolish all existing canons of descent, as well as curtesy, dower, and escheat, and would substitute statutory trusts for the surviving spouse or issue or parents or for those entitled under the statute of distributions. Primogeniture as thus abolished would probably have few mourners. It is explained in the accompanying memorandum that "the plan adopted gives effect to what, it is conceived, the majority of the intestates would have done if well-drawn wills had been prepared for them, and at the same time removes the complications and injustice which would have resulted if the present archaic law of intestacy, applicable to personal estate, had been adopted without amendment."

The proposals for land law reform in England have revolved in recent years around the conflict between those who want more complete registration and those who want simplification of the existing law; the former seem willing to simplify only if they get registration, while the latter seem unwilling to accept compulsory registration unless they get simplification. Both groups seem in danger of defeat by common opponents who oppose all change. With our systems of land registry, it is difficult for Americans to appreciate the difficulties of title investigation in England, and with our freedom from copyholds and varieties of tenures perhaps we do not appreciate, either, the impelling reasons for simplification.

Whether the central ideas of the present bill could be conveniently employed in America or not, the fact that they are being so seriously discussed in England should recommend them to our consideration. Our present situation cannot endure forever. A time is almost certain to come when some of the feudal roots will die and when new roots must be established. Judicial neglect is usually a poor method of legislation, for it leaves open the constant possibility of the embarrassment which would follow judicial revival. Much of the uncertainty in our law of future interests to-day is due to our failure to cut off the dead roots of the feudal system.[60] The departures already made in England are little known to us, and perhaps our teaching proceeds too much in the field of the old law without betrayal of their existence.

It was not a hopeful conclusion of the Real Property Commis-

[60] To determine the effect of a warranty deed, the Supreme Court of Illinois recently found it necessary to go back to the doctrine of lineal warranty before the statute of QUIA EMPTORES in 1290. Biwer *v.* Martin, 128 N. E. (Ill.) 518 (1920).

sioners in 1829 that "after all the amelioration of which the law of real property in this country is susceptible, the public must not expect that it can be rendered free from complexity and obscurity." They reminded us that "it is as impossible suddenly to change the laws as the language of any country"; although a year before the New York Revision Commissioners had not shrunk from making the attempt, in pursuance of their mandate "to render the acts more plain and easy to be understood," and after almost a century can it be said that their attempt has failed?[61] Moreover, the numerous changes since made in England have not borne out the Commissioners' fears. While it cannot be said that a century of legislative tinkering has freed the English law from complexity and obscurity, it has brought relief from some of the very things that the Commissioners feared to disturb. Perhaps property law is not so unlike other branches of jurisprudence as to be exempt from the possibility of useful inventions. It is encouraging, at any rate, to find that the ideas for which Joshua Williams was contending in 1862 have been kept alive for a half century and now seem to be bearing fruit. Whatever the fate of the Cherry Bill, it must at least serve as an important contribution to the labor which must precede any sound legislation in this field, and it gives some promise that the efforts of Lord Haldane and Lord Birkenhead may be continued by other Lord Chancellors. And while the time may never come when each man can be his own conveyancer, we may look forward to a day when it will be possible for lawyers to understand every-day land law without a range of four centuries in their research.

Manley O. Hudson.

HARVARD LAW SCHOOL.

[61] Professor Gray characterized the provisions concerning the law of trusts, in the New York statutes, as "crude and reckless legislation [which] seems to have been as unsuccessful in practice as it deserved to be." GRAY, RESTRAINTS ON ALIENATION, 2 ed., § 282. And Professor Everett Fraser finds the effect of the New York legislation to be the creation of a "system of law arbitrary and crabbed in its nature." 3 MINN. L. REV. 323. *Cf.* CANFIELD, CASES ON TRUSTS AND POWERS IN NEW YORK, p. iv. Certainly a thorough appraisal of the various New York innovations should precede any land law reform in America.